ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In The Matter of	
IMPLEMENTATION OF THE TELECOMMUNICATIONS ACT OF 1996	CC Docket No. ~~96-187~~ 96-238
AMENDMENT OF RULES GOVERNING PROCEDURES TO BE FOLLOWED WHEN FORMAL COMPLAINTS ARE FILED AGAINST COMMON CARRIERS	

COMMENTS OF THE TELECOMMUNICATIONS RESELLERS ASSOCIATION

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SUMMARY

The Telecommunications Resellers Association ("TRA"), a national trade association representing more than 500 entities engaged in, or providing products and services in support of, telecommunications resale, applauds the Commission's efforts to eliminate the seemingly interminable delays which far too often undermine the effectiveness of the Commission's existing complaint processes. As a long-standing and ardent proponent of a mandatory, efficiently-streamlined, highly expedited and fully-binding process for the prompt and equitable resolution of carrier-to-carrier disputes, TRA supports the Commission's stated intent of eliminating and/or streamlining current cumbersome and unnecessary complaint procedures and pleading requirements, but cautions against the wholesale diminution of the discovery opportunities which equalize to some degree the generally massive disparity in access to information between network service providers and their resale carrier customers. TRA further urges the Commission to reassess several of its proposed procedural modifications to obviate potentially adverse impacts on resale and other small carriers.

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COMMENTS OF THE TELECOMMUNICATIONS RESELLERS ASSOCIATION

The Telecommunications Resellers Association ("TRA"), through undersigned counsel and pursuant to Section 1.415 of the Commission's Rules, 47 C.F.R. § 1.415, hereby submits its Comments in response to the Notice of Proposed Rulemaking, FCC 96-460, released by the Commission in the captioned docket on November 27, 1996 (the "Notice"). In this proceeding, the Commission will establish streamlined complaint procedures which will allow it to satisfy the new ninety-day to five-month deadlines imposed by Sections 208(b)(1), 260(b), 271(d)(6)(B) and 275(c) of the Communications Act of 1934 ("Communications Act"),[1] as amended by Sections 101, 151 and 401 of the Telecommunications Act of 1996 ("1996 Act"), for resolution of complaints against Bell Operating Companies ("BOCs") and other telecommunications carriers.[2] The Commission has taken this opportunity, however, to reevaluate

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[1] 47 U.S.C. §§ 208(b)(1), 260(b), 271(d)(6)(B), 275(c).

[2] Pub. L. No. 104-104, 110 Stat. 56, §§ 101, 151, 401 (1996).

its complaint processes generally and has proposed to broadly apply the streamlined procedures adopted herein with the expressed intent of facilitating the "faster," but nonetheless the "full and fair," resolution of all formal complaints brought before it.[3]

As a long-standing and ardent proponent of a mandatory, efficiently-streamlined, highly expedited and fully-binding process for the prompt and equitable resolution of carrier-to-carrier disputes,[4] TRA applauds the Commission's efforts to eliminate the seemingly interminable delays which far too often undermine the effectiveness of the Commission's existing complaint processes. Accordingly, TRA supports the Commission's stated intent of eliminating and/or streamlining current cumbersome and unnecessary complaint procedures and pleading requirements, but cautions against the wholesale diminution of the discovery opportunities which equalize to some degree the generally massive disparity in access to information between network service providers and their resale carrier customers.

I.

INTRODUCTION

A national trade association, TRA represents more than 500 entities engaged in, or providing products and services in support of, telecommunications resale. TRA was created, and carries a continuing mandate, to foster and promote telecommunications resale, to support the telecommunications resale industry, and to protect and further the interests of entities engaged

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[3] Notice, FCC 96-460 at §§ 1, 2.

[4] *See, e.g.,* Comments of the Telecommunications Resellers Association in GN Docket No. 96-113, Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses, filed September 27, 1996.

in the resale of telecommunications services. Although initially engaged almost exclusively in the provision of domestic interexchange telecommunications services, TRA's resale carrier members have aggressively entered new markets and are now actively reselling international, wireless, enhanced and internet services. TRA's resale carrier members will also be among the many new market entrants that will soon be offering local exchange telecommunications services, generally through traditional "total service" resale of incumbent local exchange carrier ("ILEC") or competitive local exchange carrier ("CLEC") retail service offerings or by recombining unbundled network elements obtained from ILECs to create "virtual networks."

TRA's interest in this proceeding is in ensuring the availability for its hundreds of resale carrier members a forum in which resale carriers are afforded a full and fair opportunity to prosecute complaints against their underlying network service providers and to obtain prompt and equitable relief. Resale carriers have a disproportionate need for such a forum because of their unique vulnerability to anticompetitive abuses and other unlawful conduct. Not only are resale carriers generally dwarfed in size and resources by their underlying network service providers, but they are entirely dependent upon these carriers for the wholesale services necessary to provide retail services to their customers.

The relationship between resale carriers and their underlying network service providers is an awkward one at best.[5] On the one hand, even small resale carriers are large

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[5] The degree of awkwardness tends to increase with the size of the network service provider. The odds are that nine out of every ten customers secured by a resale carrier would be taken from a network service provider with a 90 percent market share, while only one out every ten customers obtained by a resale carrier would be taken from a network service provider with a ten percent market share. While the latter network service provider might view resale carriers as a necessary evil, the former will try mightily to avoid providing resale carriers with wholesale services at prices and in a manner that will allow for viable resale.

customers, representing substantial sources of revenues for their network service providers.[6] Resale carriers, however, also are aggressive competitors which utilize whatever service and price breaks they secure from their network service providers as a result of their substantial traffic volumes to compete for the small and mid-sized accounts that would otherwise provide these underlying carriers with their highest "margins."[7] As a result, network service providers tend to be somewhat schizophrenic in their dealings with their resale carrier customers, treating resale carriers in some instances with the solicitude that they show large corporate accounts and on other occasions attacking resale carriers as they would any other competitor.

Resale carrier customers, however, are not like other rival providers; as noted above, they are entirely dependent on their underlying network service providers for essential services and facilities and hence are generally defenseless against anticompetitive abuses and other unlawful acts perpetrated by such entities. An underlying network service provider can devastate a resale carrier customer's business, for example, by not allowing it access to rates and

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[6] Competition in the Interstate, Interexchange Marketplace, 6 FCC Rcd. 5880, ¶ 115 (1991) ("First Interexchange Competition Order"), 6 FCC Rcd. 7255 (1991), 6 FCC Rcd. 7569 (1991), 7 FCC Rcd. 2677 (1992), *recon.* 8 FCC Rcd. 2659 (1993), 8 FCC Rcd. 3668 (1993),, 8 FCC Rcd. 5046 (1993), *recon.* 10 FCC Rcd 4562 (1995) ("[R]esellers . . . are large customers.").

[7] As the Commission recognized in formulating rules to facilitate entry by smaller carriers into the monopoly local exchange market, "[n]egotiations between incumbent LECs and new entrants are not analogous to traditional commercial negotiations in which each party owns or controls something the other party desires;" rather "[u]nder section 251, monopoly providers are required to make available their facilities and services to requesting carriers that intend to compete directly with the incumbent LEC for its customers and its control of the local market." Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, FCC 96-325, ¶ 55 (released August 8, 1996), *pet. for rev. pending sub nom.* Iowa Utilities Board v. FCC, Case No. 96-3321 (8th Cir. Sept. 5, 1996), *recon.* FCC 96-394 (Sept. 27, 1996), *further recon. pending* ("Local Competition First Report and Order").

services provided to large corporate users with comparable traffic volumes,[8] by not provisioning its service orders in a timely manner or refusing other operational support,[9] by providing it with untimely, incomplete or inaccurate call detail reporting, and/or by using for its own marketing and other competitive advantage competitively-sensitive information received from the resale carrier.[10]

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[8] Acknowledging this unfortunate potential, the Congress not only imposed upon the BOCs and other incumbent local exchange carriers ("ILECs") the duty to make available for resale all services offered at retail, but required that such services be offered at wholesale rates reflective of reasonably avoidable costs, thereby guaranteeing resale carriers a viable margin within which to operate. 47 U.S.C. §§ 251(c)(4), 252(d)(3).

[9] In implementing the local competition provisions of the 1996 Act, the Commission recognized the adverse competitive impact of inferior access to operations support functions:

> [I]f competing carriers are unable to perform the functions of pre-ordering, ordering, provisioning, maintenance and repair, and billing for network elements and resale services in substantially the same time and manner that an incumbent can for itself, competing carriers will be severely disadvantaged.

Local Competition First Report and Order, FCC 96-325 at ¶ 55. To remedy this problem, the Commission directed ILECs to provision services for resale "with the same timeliness as they are provisioned to that incumbent LEC's subsidiaries, affiliates, or other parties to whom the carrier directly provides the service, such as end users." Id. at ¶ 970.

[10] The Congress sought to address this problem directly by imposing on every telecommunications carrier the "duty to protect the confidentiality of proprietary information of, and relating to, . . . telecommunications carriers reselling the telecommunications services provided by a telecommunications carrier," and prohibiting telecommunications carriers that "receive[] or obtain[] proprietary information from another carrier for purposes of providing any telecommunications service . . . [from using] such information for . . . [their] own marketing efforts," among other things. The Commission recently acknowledged the incentive and ability of network service providers to secure "anticompetitive advantage" through abuse of confidential information obtained solely by virtue of their provision of telecommunications services to competitors. Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, CC Docket No. 96-115, FCC 96-221 (released May 17, 1996).

Resale carriers have long been victimized by such tactics in the long distance and wireless industries, losing customers because service orders were not timely processed, having their customer bases raided through abuse of their carrier confidential data by their network providers, experiencing cash-flow difficulties because call detail records were withheld or bastardized, and being denied access to rates and services that have been made available to other users with commensurate, and often substantially lower, traffic volumes. These anticompetitive abuses have been tempered to some degree in the long distance, and are beginning to be tempered in the wireless, industries as viable alternative sources of network services have become available, but will be effectively remedied only when these markets become truly competitive. Abuses of this nature are fortunately becoming the exception in the long distance market, but unfortunately remain commonplace in the wireless market and will likely be even more prevalent in the local exchange market.

Resale carriers hence have a compelling need for a forum in which they can secure prompt relief from anticompetitive abuses perpetrated by their underlying network service providers. Unfortunately, the Commission's existing complaint processes have not served this critical function. The Commission's current formal complaint processes suffer from the same problems that plague virtually all adjudicatory mechanisms -- *i.e.,* they are cumbersome and costly and as a result, favor those entities which are possessed of greater resources and which coincidentally stand to benefit from maintenance of the status quo. Because complaint resolution often takes years and can require substantial investments in legal and other services, the process tends to work to the advantage of those parties who are not only able to spend considerable amounts on lawyers and experts, but who are able to act unilaterally to disadvantage others. Put

differently, a party in a position to deny something of value, or to act in a manner injurious, to another party and to defer through legal maneuvering regulatory intervention addressing such conduct will benefit from a cumbersome and costly complaint process while the party so denied or injured will suffer.[11]

In disputes between resale carriers and their underlying network service providers, the network service provider is invariably better positioned to take advantage of and to derive benefit from a costly, cumbersome dispute resolution process. Major facilities-based carriers certainly have far more extensive financial and legal resources to dedicate to the complaint process than their much smaller resale carrier customers. And the facilities-based carrier, as the provider of network services, is obviously the party positioned to either deny service to, or to provide service in such a way as to injure, the resale carrier and to benefit from any delay in resolution of the resale carrier's complaint seeking relief from such actions.[12]

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[11] As the Commission has acknowledged:

> The delays that occur under our current rules will be problematic for all carriers and, in the newly deregulated telecommunications market, small businesses and new entrants will be particularly vulnerable.[53]
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> [53] . . . Some commenters in the Section 257 proceeding cite delay under our current rules as a potential barrier to entry and to effective enforcement. The revisions proposed herein are designed to expedite the process for all carriers, thereby eliminating the real and perceived barriers cited by the commenting parties in the Section 257 proceeding.

Notice, FCC 96-460 at § 21.

[12] By way of example, if a network service provider were to discriminate against a resale carrier by denying it access to preferred price points or superior service capabilities, it is the resale carrier that would be disadvantaged competitively during any extended consideration of a complaint addressing such denial,

[footnote continued on next page]

Further compounding the problems arising from delayed resolution of resale carrier complaints against network service providers is the speed and frequency of change in the telecommunications industry. The value of particular price points and service offerings diminishes rapidly with the passage of time following their initial availability. The market is constantly evolving and moving in new and different directions. What is useful and attractive today may well be of little value tomorrow. Hence, a determination made two years after the fact that a resale carrier was wrongfully denied a price point or service offering will provide little more than a pyrrhic victory for the resale carrier. There is a strong likelihood that no such delayed directive from the Commission would ever be implemented because the price point or service offering that was the subject of the complaint would be useless to the resale carrier at that time.

To address the unique adjudicatory problems posed by the dual nature of the relationship between resale carriers and their underlying network service providers, TRA has repeatedly urged the Commission to establish a discrete, streamlined, highly-expedited process for resolving carrier-to-carrier disputes brought by resale carriers. Thematically, the keys to a viable forum for resolution of such disputes are speed, equity and certainty. If these three goals

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[footnote continued from preceding page]

while the network service provider, having determined that it was in its interest to discriminate against the resale carrier, would benefit from such delay. Likewise, if a network service provider were intentionally slowing the provisioning of service orders submitted by a resale carrier or abusing the resale carrier's confidential carrier information, the network service provider would continue to benefit from its conscious actions during any delay in resolving complaints targeting such activities, while the harm to the resale carrier would continue to mount. Indeed, if the delay in obtaining relief were extensive enough, the resale carrier could be driven into bankruptcy or forced to settle on unattractive terms to preserve its business, leaving the network service provider as the undeserving victor.

can be achieved, the Commission's formal complaint process should provide a viable forum for resolution of resale carrier/underlying network service provider disputes. This rulemaking proceeding provides the Commission with a vehicle with which to achieve this important end.

II

ARGUMENT

TRA strongly endorses the guiding principles announced in the Notice. Thus, TRA supports the Commission's effort to "implement uniform requirements and procedures to resolve all formal complaints in an expeditious and fair manner."[13] And TRA agrees with the Commission that it should seek "to achieve a full and sufficient record upon which to render decisions within the stated deadlines while not adversely affecting the rights or interests of any party."[14] TRA endorses the vast majority of the reforms described in the Notice, disagreeing in substantial part only with the proposals "to eliminate or modify the discovery process."[15]

A. Pre-Filing Procedures and Activities (¶¶ 27 - 29)

TRA agrees with the Commission that the interests of all parties to a dispute are well served by a process that encourages the resolution of differences prior to the initiation of formal adjudicatory proceedings before the Commission.[16] In TRA's view, complainants, prior

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[13] Notice, FCC 96-460 at § 26.

[14] Id. at § 21.

[15] Id. at § 22.

[16] Id. at §§ 21, 27 - 29.

to filing formal complaints, should be required to raise with prospective defendants the concerns that would underlie such actions, prospective defendants should be required to respond to such overtures expeditiously and in good faith, and both parties should be obliged to exercise reasonable, good faith efforts to resolve the controversy. Moreover, any failure to satisfy these requirements should count against the offending party in balancing the equities in a subsequent formal complaint proceeding.

To this end, TRA supports the Notice's recommendation that a complainant, as part of its complaint, should be required to certify that it has undertaken reasonable, good faith efforts to address and resolve with the defendant the matters for which it seeks relief in its complaint.[17] TRA, however, would also apply a comparable certification requirement upon defendants, obliging a defendant, as part of its answer, to certify that it has undertaken reasonable, good faith efforts to address and resolve the concerns raised with it by complainant. Just as a complainant's failure to comply with these certification requirements should constitute grounds for dismissal of its complaint, so too should a defendant's failure to comply with these certification requirements constitute grounds for summary judgment against it.

TRA submits that the nature and extent of the good faith, reasonable dispute-resolution efforts in which both complainants and defendants will be obliged to engage should be determined on a case-by-case basis. TRA, accordingly, opposes reliance upon one or more industry committees to address technical and/or business disputes among carriers.[18] There is

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[17] Id. at § 28

[18] Id. at § 29.

simply no way to ensure that any such committee will be impartial, particularly when the dispute is between a small resale provider and an entrenched facilities-based carrier. Moreover, even if referral of disputes to a committee is entirely voluntary, the likelihood that a committee-oriented preliminary dispute-resolution process could be strategically manipulated to foster delay is strong. This is not to suggest that TRA does not support and encourage the use of mediation and/or arbitration to resolve carrier-to-carrier disputes,[19] but TRA is of the view that use of alternative dispute resolution procedures should be left solely to the discretion of the parties to the dispute without a Commission-sanctioned structure beyond the streamlined formal complaint process that the Commission will establish in this docket.

B. Service (¶¶ 30 - 35)

TRA agrees with the Commission that the service of complaints and subsequent pleadings must be accelerated if the rigid statutory deadlines are to be met.[20] TRA, accordingly, endorses the Notice's proposal to require simultaneous service of complaints on the defendant (or on complainants in the case of cross-complaints), the Commission and all designated Commission personnel.[21] TRA also supports the various proposals set forth in the Notice to facilitate prompt service of complaints, including use of separate "lock boxes" for receipt of complaints against different categories of carriers and establishment of an electronic directory of agents authorized

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[19] Indeed, as an outgrowth of AT&T Corp.'s ("AT&T") reclassification as a nondominant domestic interstate interexchange carrier, TRA and AT&T established an arbitration process which provides a vehicle for resolution of disputes between AT&T and its resale carrier customers.

[20] Notice, FCC 96-460 at § 30.

[21] Id. at § 31.

to receive service of complaints lodged against individual carriers, as well as of the Commission personnel associated with complaints filed against various categories of carriers.[22] TRA further agrees with the Notice's recommendation that in order to facilitate initial review of complaints by Commission personnel, complainants should be required to submit an "intake form" demonstrating that all threshold requirements for filing a complaint have been satisfied. TRA agrees with the Commission that such an "intake form" would have the ancillary benefit of "help[ing] complainants avoid procedural and substantive defects that might delay full responses to otherwise legitimate complaints."[23] Finally, TRA agrees with the Commission that service of subsequent pleadings by overnight courier or facsimile, followed by mail delivery, is critical to the expeditious conduct of complaint proceedings.[24]

C. Format and Content Requirements (¶¶ 36 - 46)

TRA agrees with the Commission that in light of the strict statutory deadlines for resolution of formal complaints, it is imperative that both complainants and defendants be required to include in their complaints, answers and other pleadings statements of all relevant facts in their possession, verified by attesting affidavits and accompanied by supporting documentation, as well as full legal analysis.[25] To this end, TRA supports the view that complainants should be required to identify or append to their complaints the documents and

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[22] Id. at §§ 31 - 33.

[23] Id. at § 34.

[24] Id. at § 35

[25] Id. at §§ 36 - 37.

other materials that support the allegations made in the complaints, as well as the requested relief, or risk dismissal of their complaints.[26] TRA also agrees that a complainant should not only be required to identify the provisions of the Communications Act alleged to have been violated by the defendant, but should be obligated to detail the manner in which the provisions were violated.[27]

Complainants, however, should not be denied the opportunity to file in good faith complaints based on "information and belief."[28] In many instances, critical information necessary to support an allegation will be in the exclusive possession of a defendant and hence unavailable to a complainant. This eventuality will be particularly commonplace in disputes between resale carriers and their underlying network service providers involving allegations of discrimination. While a resale carrier complainant would have ample information regarding the manner in which it was treated by its network service provider, it might well have to proceed on "information and belief" with respect to the treatment of other customers. If, therefore, a resale carrier were not allowed to proceed on the basis of "information and belief," allegations of discrimination may be difficult, if not impossible, to raise by a resale carrier in a complaint brought against an underlying network service provider.

TRA supports the Notice's recommendation that pleadings be required to set forth proposed findings of fact and conclusions of law, with supporting legal analysis.[29] TRA also

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[26] Id. at § 39.

[27] Id. at § 40.

[28] Id. at § 38.

[29] Id. at § 41.

agrees that pleadings should be accompanied by proposed orders structured in a manner consistent with reported Commission orders.[30] And, it makes eminent sense to require the all pleadings and proposed orders be submitted in a designated electronic format, as well as in "hard copy."[31]

TRA endorses the additional information the Notice proposes to include in complaints, answers and authorized replies. In particular, TRA agrees with the Commission that identification of individuals likely to have discoverable information and specification of the nature of such information, as well as copies or descriptions of documents in the party's possession which would be relevant to the dispute, would serve to expedite complaint resolution.[32] TRA also concurs with the Notice that submission of relevant tariff pages should be mandatory, not discretionary.[33]

Finally, TRA agrees with the Commission that in most circumstances the additional time that would be required to comply with the proposed new form and content requirements will pay dividends in terms of prompt complaint resolution and avoidance of a protracted motions practice.[34] TRA nevertheless applauds the Commission for recognizing that such demanding complaint and pleading requirements could pose insurmountable hurdles for certain small businesses, as well as many individuals, and agrees with the Commission that

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[30] Id. at § 42.

[31] Id. at § 41.

[32] Id. at § 43.

[33] Id. at § 45.

[34] Id. at § 44.

format and content requirements should be waived upon an appropriate showing of financial hardship and/or other public interest considerations.[35] At the opposite end of the spectrum, TRA concurs with the Commission that strong sanctions should be imposed upon parties filing pleadings solely to effect delay in the prosecution or disposition of complaints.[36]

D. Answers (¶ 47)

TRA endorses the Notice's proposal to reduce the time within which answers to formal complaints must be filed from 30 to 20 days.[37] TRA agrees that the greater level of detail in, and the additional supporting documentation accompanying, formal complaints should facilitate more expedited responses to the allegations contained therein. And as the Notice correctly points out, the tight statutory deadlines do not allow for the current extended response times.[38]

E Discovery (¶¶ 48 - 56)

It is with respect to the Notice's discovery recommendations that TRA disagrees to the greatest extent with the Commission. Certainly, TRA concurs in the Commission's stated objective to "establish a quick, effective, and efficient discovery process," and does not disagree conceptually that discovery should focus on relevant issues and generate decisionally significant

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[35] Id.

[36] Id. at § 44.

[37] Id. at § 47.

[38] Id.

facts."[39] TRA is concerned, however, that eliminating or substantially reducing discovery opportunities would tilt an already skewed "playing field" further in favor of large network service providers and against small resale carriers.

As noted above, critical information, particularly information pertinent to discrimination claims, is often within the exclusive possession of network service providers and hence unavailable to resale carriers other than through discovery. While the requirements proposed by the Notice with respect to the level of detail and documentation that must be included in answers to formal complaints should reduce the need for extensive discovery, they will not obviate the need for some discovery, particularly in circumstances in which a defendant is the sole repository of information pertinent to the prosecution of a complaint. Thus, while the Federal Rules of Civil Procedure require parties, without waiting for discovery, to identify individuals likely to have discoverable material, including the subject matter of such information, and to produce documents, data compilations and tangible things relevant to disputed facts, they also provide for use of traditional discovery methods with limitations akin to those currently applied by the Commission.[40]

TRA recommends adoption of a comparable approach here and, accordingly, opposes elimination of self-executing discovery or discovery as of right.[41] TRA also opposes imposition of limits on the extent or scope of discovery beyond those already incorporated in the

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[39] Id. at § 48.

[40] Fed. R. Civ. P. 26.

[41] Notice, FCC 96-460 at § 50.

Commission's procedural rules.[42] While TRA does not oppose greater control by Commission personnel over certain elements of the discovery process, such as in the establishment of timetables within which discovery must be initiated and completed or in the granting of discovery opportunities beyond those afforded as of right, it cannot endorse proposals which would allow Commission personnel to essentially undertake discovery on behalf of the parties to a formal complaint proceeding. Within reasonable bounds, a complainant must be afforded both the opportunity and the tools with which to develop and present its case; Commission personnel, no matter how well intentioned and how well versed in the Communications Act and the Commission's Rules, should not be placed in a position of determining for a complainant how its complaint should be prosecuted. TRA also opposes adoption of standards so stringent that they would allow for additional discovery only in extraordinary circumstances rather than whenever required to ensure that justice is done.[43]

As with the limitations the Notice would impose on the ability to found complaints on "information and belief," restrictions on discovery beyond those already in place would serve primarily to disadvantage those complainants which do not have alternative means to access information possessed by the entities against which their complaints are lodged. As further noted above, this scenario is particularly compelling for resale carriers alleging discrimination against their underlying network service providers. Network service providers have in their possession information regarding their relative treatment of all customers; resale carriers have definitive data

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[42] Id. at §§ 51 - 52.

[43] Id. at § 51.

only with regard to the treatment they have received. Thus, absent assurances that discovery opportunities will be made available in such circumstances, discrimination cases may simply be abandoned as impossible to prosecute regardless of their merits.

TRA has supported herein proposals to enhance the level of detail and supporting documentation that must accompany complaints and answers. TRA further supports requirements that all relevant documents be made available with complaints and answers or at a designated date thereafter.[44] These recommendations would serve to streamline the complaint process, without undermining the ability of the parties to a formal complaint proceeding to fully and fairly present their cases. Eliminating or minimizing self-executing discovery opportunities would not only impair a party's ability to present its case, but, as suggested by the Notice, would likely prompt a more extensive motions practice and additional delays.[45] Moreover, such an approach would be virtually impossible to apply in a consistent manner given the involvement of different Commission personnel in the case-by-case determination of what discovery opportunities would be permitted in different cases.

TRA believes that as a general matter, parties should bear their respective costs of prosecuting and defending complaints, including the costs of associated discovery, but would not oppose the voluntary cost allocations envisioned by the Notice.[46] If parties wish to enter into a cost-recovery agreement among themselves, TRA believes they should be allowed to do so, but opposes any mandatory cost-sharing arrangements. TRA agrees with the Commission, however,

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[44] Id. at § 53.

[45] Id. at § 50.

[46] Id. at § 54.

that sanctions should be promptly and forcefully imposed for failure to comply with discovery requirements.[47]

Finally, TRA supports the expansion of the Common Carrier Bureau's authority to refer disputes to administrative law judges for resolution of factual issues in a formal evidentiary proceeding.[48] In TRA's view, cross-examination remains the most effective available tool for revolving contested matters of fact.

F. Status Conferences (¶¶ 57 - 59)

TRA supports the modifications proposed by the Notice to the Commission's Rules concerning status conferences. TRA agrees that status conferences should be held promptly and should be flexible enough to address any and all pending procedural and substantive matters. At a minimum, status conferences should generate strict procedural schedules; such conferences, however, should also be designed to encourage and facilitate settlement or at least the narrowing of the issues of law and fact in dispute.[49] Allowing parties to record status conferences, electronically or through a stenographer, and requiring the parties to promptly memorize in proposed orders the rulings made at a status conference should enhance the usefulness of the conference.[50]

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[47] Id. at § 55.

[48] Id. at § 56

[49] Id. at § 58

[50] Id. at § 59.

G. Cease, Cease-and-Desist Orders and Other Forms of Interim Relief (¶¶ 60 - 62)

TRA concurs with the Commission's tentative conclusion that it need not conduct a Section 312 hearing[51] before issuing a cease or cease-and-desist order or any other form of interim relief in a formal complaint proceeding brought under Section 208 of the Communications Act.[52] As the Notice correctly points out, Section 208, unlike Section 224,[53] does not cross-reference Section 312. Moreover, the statutory deadlines imposed on the conduct of a number of Title II complaint proceedings simply do not allow for the delays inherent in Section 312 hearings. As evidenced by Sections 260(b), 274(e)(2) and 275(c),[54] Congress clearly intended that the Commission have the authority to issue cease and cease-and-desist orders, and Section 4(i) certainly empowers the Commission to issue such interim relief as it deems appropriate and necessary.[55]

TRA further agrees with the Commission that minimum legal and evidentiary standards for grant of a cease or cease-and-desist order or other form of equitable relief should be adopted.[56] All parties, TRA submits, benefit from increased certainty in a litigation context. TRA further agrees that the criteria applied in evaluating requests for stay of a Commission

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[51] 47 U.S.C. § 312.

[52] 47 U.S.C. § 208;. Notice, FCC 96-460 at § 60.

[53] 47 U.S.C. § 224.

[54] 47 U.S.C. §§ 260(b), 274(e)(2), 275(c).

[55] 47 U.S.C. § 154(i).

[56] Notice, FCC 96-460 at § 61.

action or waiver of a Commission Rule should be used to determine whether issuance of a cease or cease-and-desist order is warranted. Thus, a party seeking equitable relief should generally be required to demonstrate that it is likely to prevail on the merits of its complaint, that it will suffer irreparable harm in the absence of the requested relief, that grant of the requested relief would not result in substantial injury to other parties, and that grant of the requested relief would further the public interest.[57]

In applying these well-accepted standards, however, TRA urges the Commission to weigh the showings as to each factor and grant interim relief if a showing as to one factor is particularly strong, even if the showings as to other factors are not as compelling. Moreover, TRA urges the Commission to include in the category of cognizable irreparable harm, serious damage to a resale carrier's business, even if that damage could ultimately be compensated for with monetary relief; network service providers should not be permitted to cripple an ongoing business simply because monetary compensation might be forthcoming at some future date. TRA further urges the Commission not to adopt "bonding" requirements as a prerequisite to grant of equitable relief, given that such requirements may well prevent small complainants from seeking relief to which they are legally entitled.[58]

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[57] Id. at § 61.

[58] Id.

H. Damages (¶¶ 63 - 69)

TRA endorses the voluntary reliance by complainants upon the bifurcated complaint procedures recommended by the Notice.[59] TRA agrees with the Commission that bifurcation of proceedings into liability and damage components often speeds determinations of liability, avoids unnecessary expenditures of time and resources, and facilitates more focused inquiries.[60] As recognized by the Commission, the sole negative ramification of such bifurcation is delay in the award of monetary damages; "the overall proceeding can be significantly longer if liability is found and damages are decided in a separate, second proceeding."[61] Hence, it is critical that the determination to bifurcate a complaint proceeding be left to the sole discretion of the complainant. The complainant has the right to have its complaint resolved within the applicable statutory or regulatory deadline, hence it is to the complainant that the decision to effectively extend these deadlines by opting for bifurcation under Section 1.722 of the Commission's Rules should be left.[62] Accordingly, the Commission cannot and should not impose bifurcation absent acquiescence by the complainant.

TRA does not oppose a requirement that complainants seeking monetary compensation for damages include in their complaint a computation of damages, identifying underlying information and assumptions, as well as supporting documentation.[63] TRA, however,

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[59] Id. at § 64

[60] Id. at §§ 64 - 65.

[61] Id. at § 64.

[62] 47 C.F.R. § 1.722(c).

[63] Notice, FCC 96-460 at § 66.